

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMUSEMENT INDUSTRY, INC., et al, :
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Plaintiffs, : 07-CV-11586 (LAK)
:
v. : January 16, 2013
:
STERN, et al, : New York, New York
:
Defendants. :
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TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE GABRIEL W. GORENSTEIN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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[Appearances continue next page.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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4 APPEARANCES CONTINUED:

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1 THE CLERK: Amusement Industry v. Stern, Docket 07-
2 CV-11586.

3 Would the attorneys in the room please state your
4 names for the record.

5 MR. MISSAKIAN: Good morning, Your Honor. Craig
6 Missakian for Amusement Industry.

7 MR. BAYNE: Good morning, Your Honor. David Bayne
8 and James Maloney from Kavanagh Maloney & Osnato for Buchanan
9 Ingersoll & Rooney.

10 MR. STERN: Good morning, Your Honor. Stephen Stern
11 for Mark Stern and First Republic.

12 THE COURT: On the phone, Esther Stern, you're there?

13 MS. STERN: Yes.

14 THE COURT: Who else is on the phone?

15 MR. ROSENBERG: Sam Rosenberg, lawyer for deposition
16 of Esther Stern.

17 MR. RAKOWER: Michael Rakower for Avery Egert and the
18 Safrin Group.

19 THE COURT: I'm sorry, that was Rakower?

20 MR. RAKOWER: Yes.

21 THE COURT: Go ahead.

22 FEMALE ATTORNEY: Marianna [inaudible] also on
23 behalf of the [inaudible].

24 MS. GAVIN: Nicole Gavin for Joshua Safrin.

25 THE COURT: That's it? Okay. Let's start with the

1 deposition of Esther Stern first. I guess, Mr. Rosenberg,
2 you're representing Ms. -- you can be seated if you're not
3 addressing the Court.

4 MR. ROSENBERG: Your Honor, I was retained on Monday
5 and I faxed Mr. Missakian and I called him and he -- I then
6 faxed him again and called him again on Tuesday [inaudible]
7 prepared to have a deposition [inaudible] complicated and
8 [inaudible] also I had other things [inaudible] and he was
9 going to get back to me and he said he needed to speak to
10 these other lawyers and I'm [inaudible] case.

11 THE COURT: Okay. Mr. Missakian.

12 MR. MISSAKIAN: Your Honor, we asked the other
13 lawyers in the case how they felt about scheduling the
14 deposition six to eight weeks out and Amusement believes
15 that's too long of a time. Counsel for Joshua Safrin
16 expressed the same sentiment. I don't believe we've heard
17 from counsel in the courtroom here or from Mr. Rakower but I'm
18 not sure about that. But generally speaking I think while the
19 case is complex I agree with Mr. Rosenberg. I think six to
20 eight weeks before this deposition is taken is quite a long
21 time and it should occur sooner than that.

22 THE COURT: Mr. Rosenberg, that's kind of a lengthy
23 period. Are you planning to work full time on the case
24 between now and eight weeks from now?

25 MR. ROSENBERG: I cannot work full time on this case.

1 I have other commitments.

2 THE COURT: I certainly don't --

3 MR. ROSENBERG: I can't drop everything I'm doing.

4 THE COURT: I certainly don't expect you to. I'm
5 just -- I guess -- it just seems like a long time.

6 MR. ROSENBERG: And I don't even know what I'm
7 getting into here. I've just -- I don't know the facts. I've
8 spoken to Mr. Missakian and he tells me there's multiple
9 parties and that there's huge amounts of information in this
10 case. It's a little complicated because my client is not
11 really a party, not a party, but apparently she signed some
12 documents so there's issues of spousal immunity. There's many
13 issues on this. I'll need time.

14 THE COURT: Not immunity. You mean privilege unless
15 she's being sued.

16 MR. ROSENBERG: Yes, privilege and there also may be
17 questions of immunity too.

18 THE COURT: Immunity? Okay.

19 MR. ROSENBERG: What I'd told, Mr. Missakian said
20 that this deposition if I understood him correctly could
21 take - could last a day and a half.

22 MR. MISSAKIAN: Your Honor, the only reason I said
23 that is because Mrs. Stern's deposition is being taken in two
24 cases, this case and the related Midland case. So that's the
25 only reason I said it could take two days because there are

1 two cases.

2 With regard to the reference to immunity, I think
3 Mr. Rosenberg means the Fifth Amendment privilege that her
4 husband has asserted. There may be issues involving that.

5 THE COURT: Okay.

6 MR. ROSENBERG: That's correct. And the issue that I
7 don't even know the case. [Inaudible] for a very short while
8 but [inaudible] deposition [inaudible].

9 THE COURT: Okay. Let's do this. I think six weeks
10 is as much as I can stomach right now.

11 MR. ROSENBERG: Okay.

12 THE COURT: So let's shoot for the last week in
13 February I guess.

14 MR. ROSENBERG: I'm available the 26th, 27th and the
15 28th.

16 THE COURT: Good. Let's just schedule it right now
17 so that --

18 MR. MISSAKIAN: Your Honor, oddly enough I have
19 another trial in New York that very week. So --

20 THE COURT: How long is it going to last?

21 MR. MISSAKIAN: It shouldn't go more than that week I
22 don't expect.

23 MR. ROSENBERG: I'm also available the next week.

24 MR. MISSAKIAN: The next week would be great.

25 MR. ROSENBERG: The 6th or 7th.

1 MR. MISSAKIAN: Next week would be fine, Your Honor.
2 Thank you.

3 THE COURT: 6th or 7th, 6th and 7th?

4 MR. ROSENBERG: Either. Anything -- the 4th through
5 the 7th.

6 THE COURT: What do you want?

7 MR. MISSAKIAN: Whatever is convenient for counsel. I
8 don't have my calendar in front of me. That entire week is
9 free though.

10 THE COURT: Let's say temporarily March 6th and 7th
11 which is a Wednesday and Thursday and obviously if the parties
12 want to agree to something else they can do that.

13 Mr. Missakian, anything else on the Esther Stern
14 issue?

15 MR. MISSAKIAN: No, Your Honor. Thank you.

16 THE COURT: Mr. Rosenberg, anything else?

17 MR. ROSENBERG: No. I know nothing [inaudible].

18 THE COURT: Okay. Thank you every -- you can -- it's
19 a public proceeding so you can either remain on the line or
20 hang up, Mr. Rosenberg and Ms. Stern. It's up to you.

21 MR. ROSENBERG: Thank you very much.

22 THE COURT: Okay. Thank you.

23 We're now turning to a letter dated December 21 from
24 plaintiff with a response dated January 3rd regarding
25 production of certain documents in non native -- I'm sorry, in

1 native format. Let me give the big picture on this and then
2 we'll have to give -- get more specifics.

3 There is sufficiently limited universe of documents.
4 I'm not saying they're all going to get produced but even the
5 universe is sufficiently limited that I don't view this as the
6 kind of burdensome request that's reflected in the case law
7 where there's wholesale productions being sought of documents
8 in different formats. So that's a critical distinction for
9 me.

10 Another critical distinction is unlike most cases in
11 front of me, this case has people asserting Fifth Amendment
12 privileges, strong evidence of fraudulent conduct and there's
13 good reason to believe that there may be documents with
14 metadata that could be helpful. So there's going to be some
15 production. But the question in my mind is what and Mr.
16 Missakian, I think what's lacking here and I guess this is the
17 forum in which to do it though if there's some other forum I'm
18 willing to hear it. In other words, if you want to send
19 letters or something but I need a connection between
20 particular Bates numbers I guess and what could be found and
21 so I'll -- by means of the metadata.

22 It's just not clear -- that's just the part of the
23 letter briefing that was very skimpy and conclusory.
24 Everything -- everyone was focusing on the procedural pieces.
25 So those are now out of the way. What can you do on this? I

1 have -- from the other side's letter I have the actual
2 document requests but what documents are going to have
3 metadata and why are they going to be helpful?

4 MR. MISSAKIAN: Your Honor, we could do it in a
5 couple of ways. We could go through each document now and I
6 could tell you here what we believe the relevance of each
7 document is or we can make another submission that goes
8 document by document and explains the relevance to the issues
9 in the case.

10 THE COURT: However you want to do it.

11 MR. MISSAKIAN: Well, I think --

12 THE COURT: Maybe there's some principles that you
13 might want to determine if you're operating correctly under
14 them. Maybe I can answer some generic questions. Maybe whole
15 numbers of them fit into some category or other.

16 MR. MISSAKIAN: Your Honor, that's how I was going to
17 approach it today if the Court wanted to discuss it. In my
18 mind the documents that we've requested break out into really
19 three categories of documents. The first category relates to
20 alleged forged signatures of Joshua Safrin. The second
21 category relates to documents that were given to CitiGroup and
22 other potential lenders by Mark Stern that we believe are
23 fraudulent in specific ways.

24 For example, the Court is aware that Mr. Frankel has
25 been indicted in relationship to this case and in that

1 indictment there are invoices that allegedly relate to
2 expenses that Mr. Stern was going to incur in connection with
3 this transaction.

4 THE COURT: Brokerage or something else?

5 MR. MISSAKIAN: There were consulting agreements.
6 There were brokerage agreements. For example, there was an
7 alleged broker's fee due Prudential Douglas Ellerman for
8 approximately \$9 million I believe. Plaintiff has submitted
9 declarations from the people that those invoices allegedly
10 came from and they've all stated under oath that they were
11 forged and counterfeit documents.

12 There are also -- within that same category there
13 are a number of operating agreements and other corporate
14 related documents that changed over time and I can get into
15 more detail as to why those changes relate to the scheme to
16 defraud that we've alleged.

17 The last category is the post closing. This deal
18 closed in July of 2007. That's when Amusement's money was
19 taken without its permission. In the period that followed
20 that we've alleged that Mark Stern attempted to cover up the
21 initial theft by refinancing the portfolio shopping centers,
22 and in his attempt to refinance that portfolio shopping
23 centers he went to lenders to refinance a portion of the loan
24 he had obtained from CitiGroup. One of those potential third
25 party lenders was Petra Capital, and Petra was given a number

1 of documents that we believe were fraudulent. For example,
2 there was a counterfeit promissory note that was given to
3 Petra that was meant to reflect Amusement's interest in the
4 portfolio or in the transaction. Now there's been -- Mr.
5 Bayne stated in his letter to the Court that that -- it wasn't
6 a counterfeit promissory note. Well, it actually was. This
7 is -- Amusement was given a promissory note, actually two in
8 July.

9 THE COURT: I think I remember this. It had a
10 paragraph added to make it look like a convertible debenture
11 or something?

12 MR. MISSAKIAN: That's correct, Your Honor. Mr.
13 Bayne said well, it's not counterfeit because that paragraph
14 benefitted Amusement. Well, the problem is Amusement never
15 got that promissory note, didn't know about it. The fact that
16 Mr. Stern, Mark Stern has not denied that he signed that note
17 doesn't matter. The counterfeit is something that purports to
18 be something that it isn't and in this case Petra was given a
19 promissory note that they represented to be the same note that
20 was given to Amusement and that's just not true and that's the
21 definition of counterfeit.

22 So those are the four categories of documents.

23 THE COURT: Wait, four. I have three.

24 MR. MISSAKIAN: I'm sorry. I apologize, Your Honor.
25 The three categories of documents.

1 With regard to the first one, the forged signatures,
2 there are three documents in particular that are extremely
3 important and these three documents were also referred to in
4 our crime fraud motion. These are three documents that were
5 listed by Buchanan Ingersoll & Rooney on a privilege log that
6 I believe they prepared and they sat on that log since 2008.
7 They should have been produced a long time ago. These are
8 documents that draw a critical connection between Mark Stern,
9 Stephen Friedman and Wizzy Busy. Wizzy Busy is the person who
10 sent the -- what appear to be forged Joshua Safrin signatures
11 to Herrick Feinstein which were then used to get the loan from
12 CitiGroup. These three documents should have been produced a
13 long time ago. They were --

14 THE COURT: When you say documents, you're talking
15 about emails or the attachments to the emails or what?

16 MR. MISSAKIAN: Well, the way it -- actually it's
17 both, Your Honor. These three entries on the privilege log
18 are emails. If you look at the actual document what you have
19 is an email from Mark Stern and then you have attached to
20 that --

21 THE COURT: An email from Mark Stern to?

22 MR. MISSAKIAN: To Stephen Friedman.

23 THE COURT: Right.

24 MR. MISSAKIAN: And then you have attached to that
25 email an email from Wizzy Busy --

1 THE COURT: Attached or forwarded?

2 MR. MISSAKIAN: Well, my understanding is the
3 signatures that were sent to Herrick Feinstein, the Joshua
4 Safrin signatures originally Wizzy Busy sent forged Joshua
5 Safrin signatures to Herrick Feinstein. So you have that one
6 email.

7 THE COURT: So this is an email from Wizzy Busy to
8 Herrick first?

9 MR. MISSAKIAN: First.

10 THE COURT: First there was an email from Wizzy Busy
11 to Herrick.

12 MR. MISSAKIAN: Correct. First in the chain. That
13 email, the Wizzy Busy email then is forwarded to Mark Stern.

14 THE COURT: By Herrick?

15 MR. MISSAKIAN: No, by Wizzy Busy.

16 MR. BAYNE: He's copied on the email to Herrick,
17 Judge. Stern is copied on the email to Herrick.

18 MR. MISSAKIAN: That's true but that's not what we're
19 talking about in these entries.

20 THE COURT: Let's not worry about the entries. Let's
21 worry about the documents that you're seeking.

22 MR. MISSAKIAN: We're talking about three emails.

23 THE COURT: I don't want to get into the history of
24 the entries. So let's just talk about the documents.

25 MR. MISSAKIAN: There are three emails that comprise

1 the documents that we've referred to in the request. One of
2 those is the email from Wizzy Busy to Herrick. One of those
3 is an email from Wizzy Busy forwarding that email to Herrick
4 to Mark Stern.

5 THE COURT: Hold on. Wizzy Busy to Stern forwarding
6 the email, go ahead.

7 MR. MISSAKIAN: And then the last step is Mark Stern
8 forwarding that to Stephen Friedman.

9 THE COURT: Okay. So I mean they say that Stern or
10 Friedman you think was cc'd on that first email to Herrick?

11 MR. BAYNE: No, Your Honor, he was not.

12 THE COURT: He was not, okay. So for purposes of
13 what we're doing today the only thing we're talking about I
14 assume was the third thing because that's the only thing
15 Friedman would have; right?

16 MR. MISSAKIAN: Well, we'd like the -- all three of
17 them because Mark Stern did not produce --

18 THE COURT: No, no. When it says we would like them,
19 what is it that Friedman you think has of these three emails?
20 Doesn't he just have that final? Why would he have the other
21 emails unless they were attached to the third email? He just
22 has the third email plus whatever is either attached or
23 forwarded within it; right?

24 MR. MISSAKIAN: He has all three. These documents
25 have been produced to us. So we have seen them.

1 THE COURT: It doesn't make sense he would have all
2 three. When you say have them, what does that mean? If he's
3 not a recipient of the first two emails directly -- right?

4 MR. MISSAKIAN: That's correct.

5 THE COURT: Why would he have -- what does it mean to
6 have them? So one day print them out for them and give them
7 to him? What does that mean to have them?

8 MR. MISSAKIAN: I apologize, Your Honor. I'm not
9 explaining this clearly. Mark Stern at some point it appears
10 forwarded both the original Herrick email and the Wizzy Busy
11 email to Friedman.

12 THE COURT: To Friedman, yes. So that's the only
13 email we're talking about plus -- which includes either an
14 attachment or a forwarding.

15 MR. MISSAKIAN: Yes, that's correct. I apologize.
16 Now I understand, yes.

17 THE COURT: So we have this one document from Stern
18 to Friedman which presumably is -- exists as a email on a
19 server. How does it exist right now?

20 MR. MISSAKIAN: Yes, that's our presumption. It
21 exists on a server at Buchanan, Ingersoll & Rooney or has been
22 preserved on a separate hard drive.

23 THE COURT: And that includes a PDF attachment or not
24 or who knows?

25 MR. MISSAKIAN: I don't know what form the

1 attachments are.

2 THE COURT: I just wonder if there's any -- is there
3 metadata associated with emails as opposed to documents?

4 MR. MISSAKIAN: Yes. There are headers in the emails
5 and include metadata. For example, it will show when it was
6 opened or what folder it went into.

7 THE COURT: By Friedman?

8 MR. MISSAKIAN: Correct.

9 THE COURT: Not by the -- Wizzy Busy or any of these
10 other people?

11 MR. MISSAKIAN: No, but those documents, the
12 attachment so to speak to that email Friedman received may
13 have metadata in them. For example, if they're PDFs they will
14 have metadata embedded in those documents and those documents
15 were neither produced nor logged by Mark Stern. So the only
16 source of those documents appears to be this email.

17 MR. BAYNE: Your Honor, may I? Herrick Feinstein --

18 THE COURT: I'm going to get to you in one second.

19 MR. BAYNE: Sure.

20 THE COURT: I was about to ask about Herrick.
21 Wouldn't Herrick have this also? Not that you're not entitled
22 to go to Friedman but it seems like Herrick would have the
23 original.

24 MR. MISSAKIAN: Yes, Herrick received the original
25 from Wizzy Busy, that's correct.

1 THE COURT: Right.

2 MR. BAYNE: And produced them long ago, Your Honor.

3 THE COURT: Right. Again, I'm not --

4 MR. BAYNE: We're not asking for the metadata from
5 Herrick.

6 THE COURT: I'll give you a chance to speak on this
7 one. Go ahead. Did you want to say something?

8 MR. BAYNE: Yes, Your Honor. In their letter to the
9 Court they say the reason they want this metadata on the Wizzy
10 Busy emails is to find out who Wizzy Busy is. They made no
11 showing in the letters that the metadata in the emails are
12 going to identify Wizzy Busy. We've know about Wizzy Busy
13 since 2008 and in fact the plaintiffs subpoenaed Yahoo where
14 the email address is from, the domain, and also the ISP
15 providers that apparently this email went through and they
16 were unable to find out who Wizzy Busy was. Now, they made no
17 showing that the email is going to provide them with any
18 additional information. The whole point of getting metadata
19 is to provide or yield information that will be relevant and
20 useful in the case.

21 So far we're not hearing anything that will tell us
22 that the email will provide any additional information that we
23 do not already know. So I don't think they've met their
24 burden for asking us to reproduce these documents in a
25 different format.

1 THE COURT: You think that somehow there will be
2 metadata in the PDF attachment. Is that what it is?

3 MR. MISSAKIAN: There will be metadata in the PDF.
4 It's not going to show when the underlying document was
5 created but it will show when the PDF was created presumably
6 and there is metadata embedded in the email that Stephen
7 Friedman received from Mark Stern and that metadata -- I don't
8 know what it says but it may be relevant to the issue of
9 whether or not Stephen Friedman was aware of Wizzy Busy and
10 the connection between Mark Stern and Wizzy Busy which he
11 denied in his deposition. Then after that this email shows up
12 showing a very clear connection between the three.

13 MR. BAYNE: Well, it had the emails from Herrick
14 that were sent by Wizzy Busy since at least 2009.

15 THE COURT: But not in native format.

16 MR. BAYNE: No, but they never sought it from
17 Herrick.

18 THE COURT: I understand that.

19 MR. MISSAKIAN: Your Honor, that -- those emails to
20 Herrick did not draw the connection between Mark Stern, Wizzy
21 Busy and Stephen Friedman. That's the fact that was buried in
22 this privilege log for four years that should have been
23 disclosed long ago.

24 THE COURT: So, no, no. I said I didn't want to get
25 into the privilege log. I want to get into what data might be

1 available in this. So which of the requests are this
2 Stern/Friedman email?

3 MR. MISSAKIAN: Your Honor, those are 12, 13 and 14.

4 THE COURT: And those are -- those three page numbers
5 correspond to the three emails you're talking about?

6 MR. MISSAKIAN: The three request numbers, yes, 12,
7 13 --

8 THE COURT: But I think as we've already figured out
9 they only have really -- only the third one is one that could
10 possibly have the metadata; right?

11 MR. MISSAKIAN: I can't tell you which within the --
12 for example, Request Number 12 refers to a document control
13 range of 4830 to 4833. I can't tell you which document within
14 that range is --

15 THE COURT: I'm asking you conceptually. How is that
16 Friedman produced three separate documents when he only got
17 one thing with attachments? Did he get different Bates
18 numbers to different versions? Do you understand my problem?
19 This is the first thing I asked you about. It seems like he
20 only got one email which had either attachments or forwarding
21 or whatever it was.

22 MR. MISSAKIAN: Your Honor, I believe it's three
23 separate emails.

24 MR. BAYNE: Your Honor, there were three separate
25 emails sent by Mr. Stern to Mr. Friedman on July 11th I

1 believe, several weeks after these emails had been sent to
2 Herrick.

3 THE COURT: Got it.

4 MR. BAYNE: And that's the three that were produced
5 here.

6 THE COURT: I think I understand. So that's 12, 13
7 and 14. Is that it for Safrin signatures?

8 MR. MISSAKIAN: I'm sorry, Your Honor.

9 THE COURT: Mr. Missakian, is that the limit of
10 numbers of requests that relate to Safrin signatures?

11 MR. MISSAKIAN: No, there are others, Your Honor.

12 THE COURT: Okay. Keep going.

13 MR. MISSAKIAN: Number 19 and 20.

14 THE COURT: Hold on a second.

15 [Pause in proceedings.]

16 THE COURT: 19 and 20, what are those?

17 MR. MISSAKIAN: Number 19 is a July 11, 2007 email
18 from Mark Stern to Stephen Friedman attaching an officer's
19 certificate signatures.

20 THE COURT: And 20?

21 MR. MISSAKIAN: And 20 is an email from Mark Stern to
22 Stephen Friedman attaching a designation of independent
23 director agreement.

24 MR. BAYNE: Just so we're clear, Your Honor, these
25 are not Wizzy Busy emails. These are separate emails sending

1 Safrin's signatures.

2 THE COURT: Directly from Stern?

3 MR. BAYNE: Right. I believe so, Your Honor.

4 THE COURT: But they have -- they're forgeries
5 according to you, Mr. Missakian; right?

6 MR. MISSAKIAN: They appear to be, Your Honor, yes.

7 THE COURT: Go ahead.

8 MR. MISSAKIAN: Then 32 and 33. Number 32 is an
9 email from Stephen Friedman to Joel Gantz. Joel Gantz is
10 another attorney at -- was another attorney at Buchanan
11 attaching an Safrin Associates LLC certificate. This is a
12 document that relates to another transaction, not the Colonial
13 transaction, and then 33 is an email --

14 THE COURT: But has forged signatures in your view?

15 MR. MISSAKIAN: Yes, Your Honor.

16 MR. BAYNE: Your Honor, I don't believe Mr. Safrin
17 has said that those are not his signature. I mean I have to
18 go back and look but I don't remember --

19 THE COURT: I'm wondering if this is the right forum
20 to do this now.

21 MR. MISSAKIAN: Your Honor, I think you may be right.
22 It may be more productive to make a submission to the Court
23 detailing --

24 THE COURT: I'm overruling many of the objections.
25 I'm prepared to order production of some number of documents

1 in their native format on the understanding that it's going to
2 be some limited number and on the understanding there's going
3 to be a showing that there's some significant evidentiary
4 value to them particularly if they relate to some kind of
5 fraudulent conduct on Stern's part.

6 So I need to have identified what the documents are
7 and maybe you'll drop some or maybe the two of you can work
8 this out because it's going to be ordered and I would like to
9 limit burden if there really is a burden. I don't know that
10 there truly is but I don't want to just wholesale say well,
11 every document is going to be produced without a showing as to
12 its relevance. Not only its relevance but the fact that
13 there's some potential for metadata. I don't need a strong
14 showing that -- what it's going to show because if there are
15 forged signatures and altered documents and documents that
16 brokers and consultants are saying aren't real being
17 transmitted by Stern to Friedman I want to give plaintiff
18 every opportunity to look and see if there's some clue in the
19 metadata. I'm not going to require them to make a showing in
20 advance that they're necessarily going to find it.

21 So with that in mind, maybe you can put something
22 today, Mr. Missakian, and before you come to me show it the
23 other side and maybe you guys can strike a bargain and if not
24 then I'll decide what I'm going to order.

25 MR. MISSAKIAN: That's fair, Your Honor. I'll do my

1 best to work it out with Mr. Bayne if possible.

2 THE COURT: Mr. Bayne, I'll give you a chance to
3 address that proposal, not that it's likely my mind is going
4 to be changed.

5 MR. BAYNE: I think you're correct, Your Honor. I
6 think a written submission is the best way to approach this if
7 it's going to be necessary. We think that the plaintiff
8 should have to make some sort of showing that the metadata
9 will provide some evidence of something that hasn't already
10 been established in this case. From what we've seen so far
11 Mr. Missakian hasn't come forward at least in his letter to
12 the Court and what he said today to tell us why the metadata
13 will be relevant or will be useful in any way in this matter.
14 So I think he and I need to have some discussion --

15 THE COURT: I'm not putting a very high bar on that
16 just so you're aware but there's going to be some bar. So
17 it's just -- it's just -- I don't want to just willy-nilly
18 order everything he asked for without the showing.

19 MR. BAYNE: I also think it's somewhat unfair to have
20 waited until the very end of discovery to raise this issue.
21 In fact, discovery, fact discovery is now closed.

22 THE COURT: I understand that.

23 MR. BAYNE: Are we going to reopen it?

24 THE COURT: If he was asking for all 3,000 documents
25 to be produced in native format we wouldn't be treating it

1 this way but the maximum universe is going to be in the 80s it
2 sounds like. So this is a pretty limited burden. It's not
3 going to delay anything.

4 Any other business, Mr. Missakian?

5 MR. MISSAKIAN: Your Honor, I was hoping to revisit
6 the Court's order on January 2nd with regard to the documents
7 that Mr. Friedman was ordered to produce relating to the
8 \$250,000.00 he received but I don't believe Mr. Chu is on the
9 phone.

10 THE COURT: Well, also he asked until today to
11 respond to your letter.

12 MR. MISSAKIAN: I did not know that. I traveled on
13 Monday. That may have happened and I just didn't see it.

14 THE COURT: I think we had asked him to tell you that
15 but maybe it got lost in the shuffle.

16 MR. MISSAKIAN: I wasn't aware of that.

17 MR. BAYNE: Judge, before we go on, Mr. Safrin's
18 attorneys are asking for the native files for 1,100 documents.
19 Do you think perhaps they could be directed to coordinate with
20 Mr. Missakian so we don't do this twice?

21 THE COURT: Well, it certainly wasn't presented to
22 me. Who's on the phone for Mr. Safrin?

23 MS. GALVIN: Nicole Galvin. We'd be happy to
24 coordinate.

25 THE COURT: I don't know the particulars of what was

1 requested by Mr. Safrin previously. So it's a clean slate as
2 far as you guys are concerned. For all I know the request is
3 totally unreasonable or reasonable. I have no idea. So sure,
4 go ahead and coordinate.

5 What else can I do for you?

6 MR. BAYNE: I realize Your Honor is very busy but
7 there are also a lot of disputes about the privilege logs
8 which may become moot when Your Honor decides the crime fraud
9 motion. Do you have --

10 THE COURT: The crime fraud motion.

11 MR. BAYNE: Do you have an estimate of when you're
12 going to get to that?

13 THE COURT: I want to be realistic. I think the best
14 case scenario is three weeks and the worst case scenario is
15 sometime after that. I don't know that that helps you.
16 People are holding off on things depending upon how I decide
17 that; is that what's going on?

18 MR. BAYNE: Yes, I think Mr. Missakian wrote you a
19 letter saying that we would put that off until we saw what
20 happened as a result of the decision on the motion.

21 THE COURT: Well now you've inspired me to act in a
22 shorter period. I have a trial next week which is going to
23 make things harder for me but I think there's a good shot I
24 can do it three weeks from Friday. So I'll make that my
25 mental deadline.

1 If you want to write me a letter after that asking
2 what the plan is -- in fact, let me direct you so you don't
3 feel inhibited about doing that. Mr. Missakian, why don't you
4 write me a letter on the 11th if you want to -- to ask about
5 progress and maybe I can give you some direction. I have been
6 busy not only on many other cases but other Amusement matters
7 including I think a BIR motion.

8 MR. MISSAKIAN: Yes, Your Honor.

9 THE COURT: In the 11 case; right?

10 MR. MISSAKIAN: Yes, Your Honor.

11 THE COURT: Motion to dismiss.

12 MR. MISSAKIAN: That's outstanding, yes.

13 THE COURT: That will come sooner. Anything else?

14 MR. BAYNE: I don't think so, Your Honor.

15 MR. MISSAKIAN: No, Your Honor.

16 THE COURT: Thank you everyone.

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

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5 _____
6 Shari Riemer

7 Dated: January 20, 2013
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